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Attorneys for Defendant JOSEPH BOTELHO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII#

WENDELL TANGARO,

Plaintiff,

vs.

JOSEPH BOTELHO, COUNTY OF
HAWAII, AND JOHN DOES 1-10,

Defendants.

Civil. No. 03-00211 JMS/LEK

DEFENDANT JOSEPH BOTELHO'S
SEPARATE CONCISE STATEMENT
OF FACTS IN SUPPORT OF HIS
MOTION FOR RECONSIDERATION
OF HIS MOTION FOR SUMMARY
JUDGMENT; DECLARATION OF
JOSEPH BOTELHO; CERTIFICATE
OF SERVICE

Hearing:

Date:

Time:

Judge: J. Michael Seabright

Trial Date:

Date: March 7, 2006

Time: 9:00 a.m.

Judge: J. Michael Seabright

**DEFENDANT JOSEPH BOTELHO’S SEPARATE CONCISE STATEMENT OF
FACTS IN SUPPORT OF HIS MOTION FOR RECONSIDERATION OF HIS
MOTION FOR SUMMARY JUDGMENT**

Pursuant to LR 56.1(c), Defendant Joseph Botelho (“Officer Botelho”), by and through his undersigned counsel, hereby submits his separate concise statement of material facts in support of his Motion for Summary Judgment.

The “Evidentiary Support” of Officer Botelho’s motion consists of the Declaration of Officer Joseph Botelho, the Declaration of Counsel and Exhibit “1”.

COUNTY’S STATEMENT OF FACTS

FACTS
(WITH THE MATERIAL FACTS EMPHASIZED)

1. On April 17, 2002, Officer Botelho responded to a report of a theft in progress at the Laundromat located on Shipman Street.
2. Upon his arrival, Officer Botelho parked his vehicle in the roadway on the passenger side a sedan, exited his vehicle and approached Officer Amuimuia and Justin Aoki (“Aoki”) who were standing near the passenger door of the sedan. Aoki and the sedan he was located in, fit the description of the vehicle and suspect in the theft in progress case.
3. As Officer Botelho approached Officer Amuimuia and Aoki’s position, Officer Botelho noticed another male lying in the back seat of the sedan.
4. Officer Botelho then noticed a male later identified as Roger Starbuck (“Starbuck”), standing at the entrance to the Laundromat. Officer Amuimuia left Aoki with Officer Botelho and walked over to Starbuck.

EVIDENTIARY
SUPPORT

Paragraph 3 of
the Declaration
of Officer
Botelho

Paragraph 4 of
the Declaration
of Officer
Botelho

Paragraph 5 of
the Declaration
of Officer
Botelho

Paragraph 6 of
the Declaration
of Officer
Botelho

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| 5. Officer Botelho asked Aoki to step to the rear of the sedan and began to question Aoki about the reported incident. Officer Botelho realized that he did not have his notebook to take notes, informed Aoki to remain at the rear of the sedan and returned to his subsidized police vehicle to retrieve his notebook. | Paragraph 7 of the Declaration of Officer Botelho |
| 6. While at his vehicle, Officer Botelho noticed that Aoki had returned to the drivers seat of the sedan and appeared to be talking to the male lying on the back seat of the sedan. | Paragraph 8 of the Declaration of Officer Botelho |
| 7. The male lying in the back seat of the sedan, later identified as Wendell Tangaro ("Tangaro"), exited the sedan, yanked Aoki out of the driver's seat of the sedan, entered the driver's seat and shut the driver's side door. | Paragraph 9 of the Declaration of Officer Botelho |
| 8. Officer Botelho approached the passenger side door of the sedan and attempted to open the passenger door but Tangaro reached over and locked the passenger door before Officer Botelho could open the door. | Paragraph 10 of the Declaration of Officer Botelho |
| 9. Officer Botelho then reached through the partially open window of the passenger door to unlock the door that Tangaro had just locked. | Paragraph 11 of the Declaration of Officer Botelho |
| 10. Tangaro started the sedan, revved the engine and moved the vehicle forward slightly. Being cautious not to get his hand caught in the window and dragged along the road, Officer Botelho removed his hand from the sedan window. | Paragraph 12 of the Declaration of Officer Botelho |
| 11. Tangaro revved the engine again, accelerated in reverse screeching the tires and turned the sedan as he reversed. | Paragraph 13 of the Declaration of Officer Botelho |
| 12. Officer Botelho stepped back as Tangaro reversed so as not to be struck by the front passenger corner of the sedan as it reversed and turned. | Paragraph 14 of the Declaration of Officer Botelho |

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| 13. Tangaro's action of reversing and turning the vehicle, placed Officer Botelho directly in the path of the sedan when Tangaro stopped the vehicle. | Paragraphs 15 of the Declaration of Officer Botelho |
| 14. Officer Botelho moved to his left to get out of the path of the vehicle and yelled for Tangaro to stop. | Paragraph 16 of the Declaration of Officer Botelho |
| 15. Tangaro revved the engine of the vehicle and began to accelerate forward. | Paragraph 17 of the Declaration of Officer Botelho |
| 16. Officer Botelho continued to move to his left, to get out of the path of the sedan yelling for Tangaro to stop, but the sedan continued to accelerate forward towards Officer Botelho. | Paragraph 18 of the Declaration of Officer Botelho |
| 17. When the sedan was within five feet of Officer Botelho's location, Officer Botelho felt that he could not get out of the path of the sedan and feared that he would be struck by the accelerating sedan. Officer Botelho drew his firearm and fired once at the sedan. | Paragraph 19 of the Declaration of Officer Botelho |
| 18. The bullet went through the center of the front windshield of the sedan striking Tangaro in the neck. | Paragraph 20 of the Declaration of Officer Botelho |
| 19. Once Officer Botelho fired the first shot, the sedan stopped moving forward and no additional shots were fired. | Paragraph 21 of the Declaration of Officer Botelho |
| 20. The sedan slowly rolled forward and came to rest against the curb of Shipman Street, striking a parking meter. | Paragraph 22 of the Declaration of Officer Botelho |

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| 21. Officer Botelho was appointed as a police officer on February 16, 1982. | Paragraph 23 of the Declaration of Officer Botelho |
| 22. Officer Botelho was trained in the use of firearms and was utilizing the authorized 9MM sidearm issued by the Hawai'i County Police Department for which he is qualified. | Paragraph 24 of the Declaration of Officer Botelho |

Dated: Hilo, Hawai'i, January ____, 2006.

JOSEPH BOTELHO, Defendant

By /s/ Harry P. Freitas
HARRY P. FREITAS
Deputy Corporation Counsel
His Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII#

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Civil. No. 03-00211 JMS/LEK

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served
upon the following by mailing the same, postage prepaid, on January 6, 2006:

ERIC A. SEITZ
LAWRENCE I. KAWASAKI
Attorneys at Law
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Honolulu, Hawaii#96813
Attorneys for Plaintiff

/s/ Harry P. Freitas
HARRY P. FREITAS
Deputy Corporation Counsel
County of Hawaii#

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII#

WENDELL TANGARO,
Plaintiff,

vs.

JOSEPH BOTELHO, COUNTY OF
HAWAII, AND JOHN DOES 1-10,

Defendants.

Civil. No. 03-00211 DAE/LEK

DECLARATION OF JOSEPH
BOTELHO

DECLARATION OF JOSEPH BOTELHO

Pursuant to 20 U.S.C. §1746, Joseph Botelho declares the following:

1. That I am employed as a police officer with the County of Hawai'i.
2. That I am the above-mentioned defendant in this case.
3. On April 17, 2002, I responded to a report of a theft in progress at the Laundromat located on Shipman Street.
4. Upon my arrival, I parked my vehicle in the roadway on the passenger side of the sedan, exited my vehicle and approached Officer Amuimuia and Justin Aoki ("Aoki") who were standing near the passenger door of the sedan. Aoki and the sedan he was located in fit the description of the vehicle and suspect in the theft in progress case.
5. As I approached Officer Amuimuia and Aoki's position I noticed another male lying in the back seat of the sedan.
6. I noticed a male later identified as Roger Starbuck ("Starbuck") standing at the entrance to the Laundromat. Officer Amuimuia left Aoki with me and walked over to Starbuck.
7. I asked Aoki to step to the rear of the sedan and began to question

Aoki about the reported incident. I realized that I did not have my notebook to take notes, informed Aoki to remain at the rear of the sedan and returned to my subsidized police vehicle to retrieve my notebook.

8. While at my vehicle, I noticed that Aoki had returned to the driver's seat of the sedan and appeared to be talking to the male lying on the back seat of the sedan.

9. The male lying in the back seat of the sedan, later identified as Wendell Tangaro ("Tangaro"), exited the sedan, yanked Aoki out of the driver's seat of the sedan, entered the driver's seat and shut the driver's side door.

10. I approached the passenger side door of the sedan and attempted to open the passenger door but Tangaro reached over and locked the passenger door before I could open the door.

11. I then reached through the partially open window of the passenger door to unlock the door that Tangaro had just locked.

12. Tangaro started the sedan, revved the engine and accelerated the vehicle forward slightly. Being cautious not to get my hand caught in the window and dragged along the road, I removed my hand from the sedan window.

13. Tangaro revved the engine again, accelerated in reverse screeching the tires and turned the sedan as he reversed.

14. I stepped back as Tangaro reversed so as not to be struck by the front passenger corner of the sedan as it reversed and turned.

15. Tangaro's action of reversing and turning the vehicle, placed me directly in the path of the sedan when Tangaro stopped the vehicle.

16. I moved to my left to get out of the path of the vehicle and yelled for Tangaro to stop.

17. Tangaro revved the engine of the vehicle and began to accelerate forward.

18. I continued to move to my left, to get out of the path of the sedan yelling for Tangaro to stop, but the sedan continued to accelerate forward towards me.

19. When the sedan was within five feet of my location and I felt that I could not get out of the path of the sedan, fearing that I would be struck by the accelerating sedan, I drew my firearm and fired once at the sedan.

20. The bullet went through the center of the front windshield of the sedan striking Tangaro in the neck.

21. Once I fired the first shot, the sedan stopped moving forward and no additional shots were fired.

22. The sedan slowly rolled forward and came to rest against the curb of Shipman Street striking a parking meter.

23. I was appointed as a police officer on February 16, 1982.

24. I was trained in the use of firearms and was utilizing the authorized 9MM sidearm issued by the Hawai'i County Police Department for which I am qualified.

I declare under penalty of law that the foregoing is true and accurate.

Dated: Hilo, Hawai~~i~~, _____.

JOSEPH BOTELHO